IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.713 OF 2007
IN
NOTICE OF MOTION NO.1585 OF 2006
IN
S.C. SUIT NO.1585 OF 2006

Shri Purushottambhai Goswami
and Ors. .. Appellants

Versus

Shri Ranjit R. Gaja & Ors. .. Respondents

Shri M.S. Menon for the Appellants
Shri R.N. Narula i/b. Jhangiani Narula and Assoc. for the Respondent

CORAM : S.R. SATHE,J.
DATED : 23/10/2007

PC :-

1. Heard both the learned Advocates at length.

2. Appeal heard finally at admission stage.

3. The Appellant-original Plaintiffs in S.C. Suit No.1585 of 2006 have filed this appeal against the order passed in Notice of Motion No.1585 of 2006 by Judge, City Civil Court Greater Bombay whereby defendants were restrained from creating any third party interest and/or alienating 12 flats in Pratap Garden building upto and inclusive 15/08/2007 subject to those of the Plaintiffs who have opted for

additional area pursuant to their respective agreements depositing the entire amount in the Court on or before 20/07/2007 and it was further directed that in the event of Plaintiffs' failure to deposit the amount as above the injunction granted as above to stand automatically vacated in respect of the flats on 20/07/2007 itself. For the sake of convenience hereinafter the parties shall be referred to as Plaintiff and defendants.

4. The brief facts giving rise to this appeal are as under:-

Plaintiff Nos. 1 to 12 are the members of Plaintiff No.13 Society. Plaintiff No.14 is another society. The defendant Nos. 1 to 3 are the legal heirs of Ramchand, Bhojraj and Thakurdas respectively. They formed a partnership by name P.T. Builders. They decided to construct building on the suit plot. Plaintiff Nos. 1 to 12, therefore executed an agreement in 1973. The P.T. Builders partnership firm was dissolved then defendant Nos. 1 to 3 in the year 2003 agreed to fulfill obligation arising out of the contract entered into by their predecessor. At that time, the defendant No.4 builder, developer offered Plaintiff No.13 society that the existing two buildings

would be demolished and in its place two towers would be constructed at the said place. In pursuance of the said offer ultimately agreements were entered into between Plaintiff Nos.1 to 12 and defendant No.4. However, it is Plaintiff's case that under the guise of entering into the development agreement the defendant cheated Plaintiffs. They did not carry out their obligation. According to Plaintiff, defendant No.4 failed to discharge his obligation under the agreement dated 31/01/2005. Plaintiffs, therefore, filed suit for declaration that defendants are liable to specifically perform the terms and conditions of the agreements dated April-1973 and 31/01/2005 and to execute the sale deed accordingly and that Plaintiff Nos.1 to 12 are entitled to get the flats in 'B' Wing of Pratap Garden, equivalent to area occupied by each of the Plaintiff in existing building known as 'Goverdhan Gaja Co-operative Society Ltd.' at Popatwadi, Kandivali and for permanent injunction restraining defendants from dealing in any manner with the flats in the building known as Pratap Garden constructed on the suit plot.

5. Plaintiffs also filed Notice of Motion No.1585 of 2006 and prayed for temporary mandatory order directing defendants to put Plaintiff Nos.1 to 12 in

possession of their respective flats in 'B' Wing of Pratap Garden Building constructed on the suit land and for temporary injunction restraining them from creating third party interest in the said flats till the disposal of the suit.

6. The defendant No.4 filed affidavit in reply and opposed the Notice of Motion on several grounds including that the suit is not properly valued. The defendant No.4 also denied that the subsequent agreement of the year 2005 is an extension of the agreement executed in 1973 by the defendant's predecessor. The defendant further contended that Plaintiffs have suppressed the material facts and documents and abandonment of the contract by the Plaintiff and as such Plaintiffs are not entitled for equitable relief of temporary injunction. The defendant No.4 contended that the agreement in question was contingent and contingency having not occurred Plaintiffs are not entitled to seek specific performance.

7. After hearing arguments of both the learned Advocates and considering documents produced by the parties, the learned Trial Judge came to the conclusion

that as suit is for specific performance of an agreement executed under the Maharashtra Ownership Flats Act, 1963. The relief is not susceptible to any monetary valuation and as such suit is properly valued as per clause-6(iv)(j) of the Bombay Court Fees Act, 1959. The learned Trial Judge also held that Plaintiffs have suppressed the material facts and they have in fact failed to pay the additional amount which they had agreed and as per clause-8 of the agreement dated 31/01/2005, the developer-defendant No.4 was entitled to sale the suit flats and Plaintiffs were not entitled to ask for specific performance as alleged. However, in view of the statement made by the learned Advocate for the Plaintiffs that all the members of Plaintiff No.13 Society have given consent as per clause-7 of the agreement Exh-D, he passed conditional order as mentioned earlier.

8. Being aggrieved by the said order Plaintiffs have filed the present appeal. In this appeal before me, Shri Menon, learned Advocate for the Plaintiffs has urged only two points. Firstly, he submitted that as the suit is for specific performance of the agreement executed under the Maharashtra Ownership Flats Act, 1963 the provisions of Section-6(xi) of the Bombay

Court Fees Act are not applicable and suit falls under section-6(IV)(j) of the said Act and there is no substance in the defence taken by the defendant that the suit is not properly valued and proper court fee stamp has not been paid. Secondly, he submitted that the learned Trial Judge ought to have held that Plaintiffs were all along ready and willing to perform their part of the contract but the defendant No.4 failed to comply his obligation. So, according to him, the learned Trial Judge ought to have held that Plaintiffs have made out a prima facie case for granting temporary injunction as prayed and balance of convenience was also in favour of Plaintiff. He, therefore, submitted that the appeal be allowed and the order passed by the learned Trial Judge be set aside.

9. As against this, Shri Narula, learned Advocate for the defendants supported the order passed by the learned Trial Judge and submitted that in view of the Plaintiff's relief claimed under Clause-B of the plaint the suit ought to have valued as per Section-6(xi) of the Bombay Court Fees Act and if valued accordingly, City Civil Court has in fact no jurisdiction to try the present suit. Secondly, he canvassed before me that though Plaintiffs filed suit for specific performance,

they have not at all pleaded and proved even prima facie that they were and are ready and willing to perform their part of the contract. He also submitted that Plaintiffs have failed to make payment as agreed and the agreement in question in fact was abundant. He, therefore, submitted that Plaintiffs have not made out any prima facie case. He also submitted that the defendant No.4 has invested huge amount and carried out construction. So, if defendant No.4 is restrained from disposing of the said flats, irreparable loss will be caused to him. He, therefore, submitted that the appeal be dismissed.

10. It is not in dispute that the predecessor of defendant Nos.1 to 3 had initially executed an agreement in favour of Plaintiffs. It is also admitted that finally the defendant No.4 agreed to develop the suit property and he entered into agreements with Plaintiff Nos.1 to 12. It is also not in dispute that the Plaintiff No.13 is the Society of Plaintiff Nos.1 to 12. It is also an admitted fact that defendant No.4 has carried out development. The main question is whether Plaintiffs are entitled for specific performance of the agreement dated 31/01/2005.

11. As the suit is for specific performance of an agreement to sale, it falls under Section-6(xi) of the Bombay Court Fees Act, 1959. The said Section says :-

> ***"The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-***
>
> ***(xi) for specific performance.***
>
> ***In suits for specific performance -***
>
> ***(a) of a contract of sale – according to the amount of the consideration.***
>
> ***(b) of a contract of mortgage – according to the amount agreed to be secured.***
>
> ***(c) of a contract of lease – according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term.***
>
> ***(d) of an award – according to the amount or value of the property in dispute."***

However, the learned Advocate for the Plaintiffs has drawn my attention to a case **Maria Philomina Pareira V/s. M/s.Rodrigues Construction 1990 Maharashtra Law Journal 445** wherein this Court (Coram : H.Suresh, J.) has made following observations :-

> ***"in a situation of this type where the flat purchaser wants the promoter to comply with the requirements of the law***

and a suit is filed to enforce such obligations, may be arising out of an agreement as such, in my view such a suit would not fall within the scope of section 6(xi)of the Bombay Court-Fees Act, 1959. It is a statutory obligation which is being enforced and a notional valuation under section 6(iv)(j) of the Court-Fees Act would be proper. In fact, in all such agreements, even if they are enforced in favour of the flat purchasers individually, there can be no conveyance in their favour as ultimately conveyance has to be in favour of the Society of all flat purchasers. I may further mention that under the Ownership Flats Act, if the promoter does not comply with these obligations, there are other serious consequences to follow, including a prosecution. Ordinarily such considerations would not arise when a simple contract entered into between two individuals is broken. Therefore, it must necessarily be held that whenever a builder enters into an agreement with any flat purchaser, containing provisions which are to be incorporated as provided under the said Act, all such agreements must necessarily be held to be special agreements which can be enforced by filing suits where the valuation would be a notional valuation under section 6(iv)(j) of the Bombay Court-Fees Act, 1959."

12. I have carefully gone through the above cited judgement. However, with respect, I may say that though in the above cited ruling it has been observed that the provisions of Section-6(xi) of the Bombay Court Fees Act are not applicable, it is nowhere specifically mentioned or pointed out as to why the said Section is

not applicable in respect of an agreement to sale a flat which is executed in accordance with the provisions of the MOFA. The bare reading of the clause-6(xi) mentioned above clearly indicates that once the suit is for specific performance of a contract of sale then it has to be valued as per Clause-6(xi). It is nowhere specifically mentioned in this provision that if the provisions of MOFA are applicable to such agreement then the suit for specific performance shall not be valued as per the above mentioned clause-6(xi). Nor there is anything in the MOFA which suggests that in respect of an agreement executed in accordance with the provisions of MOFA, special privileges or benefits are given by the statute and for implementation of such agreement the provisions of Section-6(xi) are not applicable. Merely because, in MOFA there is provision for some penal liability or conviction, it can not be said that the said provision takes away the agreement out of the ambit of Section-6(xi) of Bombay Court Fees Act, 1959. Any suit for specific performance of an agreement to sale is ultimately governed by the statutory provisions. Such suit is filed against the defendant because he commits breach of some legal obligation. So, merely because the Plaintiffs have drafted the suit in a skillful manner and have prayed

that the defendants be directed to enforce the agreement executed as per the provisions of MOFA that does not mean that the suit is basically and mainly for permanent injunction. It is needless to say that while considering as to which provisions of the Bombay Court Fees Act are applicable to a particular suit, one must take into consideration the allegations in the plaint and see as to what in substance the suit is for. After reading the prayer clause one must find out what is the substantial relief claimed by the Plaintiff. So, in my humble opinion, merely because the agreement in question is executed in accordance with the provisions of MOFA, it can not be said that the suit which is in substance a suit for specific performance of the agreement in question will be governed by the provisions of Section-6(iv)(j) of Bombay Court Fees Act. On the contrary, such suit shall have to be valued as per the provisions of Section-6(xi) of the Bombay Court Fees Act.

13. It is therefore, in fact necessary to refer the issue namely whether the suit for specific performance of an agreement to sale flat (executed in accordance with the provisions of MOFA) seeking possession of the said flat will come within purview of Section-6(iv)(j)

or section-6(xi) of the Bombay Court Fees Act.

14. However, prima facie I am of the opinion that the finding recorded by the learned Trial Judge is not legal and proper and the suit in question in fact comes within the purview of Section-6(xi) of the Bombay Court Fees Act. So, obviously valuation made by the Plaintiffs is not proper and suit ought to have been valued and Court Fee should have been paid in accordance with the provisions of Section-6(xi) of Bombay Court Fees Act. If valued accordingly, the suit is certainly not maintainable in the Court of City Civil, Bombay as pecuniary jurisdiction of City Civil Court Bombay is only Rs.50,000/-. So, under such circumstances, no interim relief can be granted by the City Civil Court and the same can be rejected on the above mentioned ground alone.

15. Turning to the merits of the case, it must be noted that Plaintiffs have made inconsistent pleadings. At one stage, Plaintiffs have averred that by getting the suit agreement Exh-D executed the defendant No.4 has cheated them. While at the same time, they are asking for specific performance of the agreement in question.

16. From the perusal of the plaint, it is very clear that Plaintiffs have filed the present suit for specific performance of the agreements Exh-B (April-1973) and Exh-D executed in January-2005. Naturally, the provision of Section-16(c) of the Specific Relief Act is applicable. From the pleadings, it appears that Plaintiffs have failed to aver that they were and are ready and willing to perform their part of the contract but defendants committed breach. On the contrary, as observed by the learned Trial Judge, it appears that the Plaintiffs have in fact committed breach of the agreement. Not only that but at one point of time, they even wrote a letter to defendants and thereby abandoned the contract. When such is the position, Plaintiffs are certainly not entitled for equitable relief of temporary injunction. It is true that the averments with regard to readiness and willingness can be made even by amending the pleadings. But unfortunately, in the instant case till the decision of the Notice of Motion, Plaintiffs did not amend the pleadings, though, defendant had specifically taken necessary contentions regarding readiness and willingness.

17. Admittedly, as per the agreement Exh-D to the

plaint Plaintiff who had opted for additional area in the proposed new building at Pratap Garden were to pay certain conditional consideration to the defendant No.4. However, there is nothing on record to show that Plaintiffs accordingly paid additional consideration as agreed and complied their part of the contract. So, as Plaintiffs have failed to perform their part of the agreement or promise the learned Trial Judge has refused to grant discretionary relief in favour of Plaintiffs.

18. The learned Advocate for the defendants strenuously argued before me that in the instant case Plaintiffs have not even complied the stipulation mentioned in Clause-7 of the agreement Exh-D to the Plaint and as such Plaintiffs are not entitled for temporary injunction as prayed. It would be worthwhile to see what clause-7 of the said agreement says. It runs as follows :-

> ***"It is agreed between the society and developers that the developers shall obtain the consent of remaining 4 members of the society within 6 months from the execution of this agreement. If developers fails to take the consent of remaining 4 members within 6 months then this agreement shall deemed to be terminated and cancelled and neither party shall claim right and interest or***

compensation on each other. If both the parties agreed then they can extend this period for further 6 months with mutual consent. However if remaining members are not giving the consent within stipulated period then in such case the developer can carry out the works and can sell the flats retained for the members and developer will not utilize the existing constructed FSI of the society."

19. It is an admitted fact that defendant No.4 had written to Plaintiff No.13 Society several letters (Exh-8,9 and 10) dated 09/02/2006, 09/03/2006 and 01/04/2006 respectively. It is clear that specific time was granted to Plaintiffs. But, admittedly, no consent of the remaining 4 members as contemplated by clause-7 was obtained and no additional payment was also made. In fact, we find that Plaintiffs have deliberately suppressed all these material facts with regard to consent and making additional payment and grant of extension of time etc. It indicates that Plaintiffs have not approached to the Court with clean hands. So, learned Trial Judge has rightly observed that Plaintiffs are not entitled for discretionary relief. Thus, from the perusal of the order passed by the learned Trial Judge it appears that learned Trial Judge rightly observed that Plaintiffs have failed to make out a prima facie case for granting temporary

injunction.

20. So far as question of balance of convenience is concerned it must be noted that Plaintiffs have failed to comply their part of the contract. Additional payment as promised has not been paid by the Plaintiffs for additional area. The defendant No.4 has prima facie shown that he has spent huge amount for the settlement with tenants and occupants and for payment to the owner to secure development rights and the cost of construction of 'A' and 'B' Wing. So, if temporary injunction as prayed is granted then irreparable loss is likely to be caused to the defendant No.4. So, the balance of convenience is also not in favour of Plaintiffs.

21. It must be noted that even after coming to the conclusion that Plaintiffs have failed to make out a prima facie case and the balance of convenience is not in their favour, the learned Trial Judge passed conditional order whereby he restrained defendants from creating any third party interest and/or alienating 12 flats in Pratap Garden Building upto a particular date subject to Plaintiffs who have opted for additional area, depositing the entire amount in Court on or

before 20/07/2007. There is nothing before me to show that accordingly the said Plaintiffs have deposited the amount within the time as per the order passed by the Trial Judge. In view of above, there is no substance in the present appeal. Hence, I pass the following order:-

O R D E R

Appeal is dismissed.

Under the circumstances of the case parties to bear their own costs of this appeal.

(S.R.SATHE,J.)